

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CINDY H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C21-5381 RAJ

**ORDER REVERSING AND
REMANDING DENIAL OF
BENEFITS**

Plaintiff seeks review of the denial of her application for disability insurance benefits. Plaintiff contends the ALJ erred by failing to give clear and convincing reasons to reject Plaintiff's testimony regarding her migraine condition, and by rejecting the opinions of Crystal Wilmot, ARNP. Dkt. 13, p. 1. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for an award of benefits.

BACKGROUND

Plaintiff is 54 years old, has a high school education, and has worked as a dispatcher, hotel clerk, receptionist, customer service clerk, and general office clerk. Admin. Record (Dkt. 10), 1326–27. On January 21, 2015, Plaintiff applied for benefits, alleging disability as of November 1, 2014. AR 313–14, 1304. At the most recent hearing, Plaintiff amended her alleged onset date to December 1, 2016. AR 1305, 1344–45. Plaintiff's applications were

1 denied initially and on reconsideration. AR 130–56. ALJ Rebecca L. Jones held three hearings,
2 the first of which was postponed to allow Plaintiff to obtain counsel. AR 37–129. On June 27,
3 2018, ALJ Jones issued a decision finding Plaintiff not disabled. AR 15–28.

4 The Appeals Council subsequently denied review, and Plaintiff sought judicial review
5 before this Court. AR 6–8, 1397–98.

6 On March 3, 2020, U.S. District Judge Benjamin H. Settle entered an order reversing the
7 Commissioner’s denial of benefits and remanding the case for further administrative
8 proceedings. AR 1405–15. Judge Settle held the ALJ did not err in rejecting Plaintiff’s
9 testimony regarding the severity of her migraines for the period from January 2015 through 2016
10 “because Plaintiff received little treatment for migraines during that time.” AR 1410. Judge
11 Settle held the ALJ erred, however, in rejecting Plaintiff’s testimony regarding the severity of her
12 migraines from late 2016 on. AR 1411–12. Judge Settle held the ALJ did not err in rejecting an
13 opinion from Ms. Wilmot dated September 28, 2017. AR 1413–14.

14 On remand, the ALJ held a new hearing in December 2020. AR 1338–65. The ALJ then
15 issued a new decision again finding Plaintiff not disabled. AR 1304–28. In relevant part, the
16 ALJ found Plaintiff had severe impairments of, among other things, migraine headaches. AR
17 1307. The ALJ found Plaintiff had the residual functional capacity to perform light work with
18 additional physical and mental restrictions. AR 1310–11.

19 The Appeals Council did not assume jurisdiction after the ALJ’s latest decision, and thus
20 it became the Commissioner’s final decision. *See* 20 C.F.R. § 404.984(d). Plaintiff seeks
21 judicial review of this 2020 ALJ decision.

22 DISCUSSION

23 The Court may set aside the Commissioner’s denial of Social Security benefits only if the

1 ALJ's decision is based on legal error or not supported by substantial evidence in the record as a
2 whole. *Ford v. Saul*, 950 F.3d 1141, 1153–54 (9th Cir. 2020).

3 **A. Plaintiff's Testimony Regarding Migraines**

4 Plaintiff contends the ALJ erred by rejecting her testimony regarding the severity of her
5 migraines. Dkt. 13, pp. 2–9. Plaintiff testified she has migraines three to five times a week,
6 lasting from two to 12 hours. AR 70, 73–74, 90, 120, 1353–54. She testified her migraines cause
7 her pain and make it difficult to concentrate. AR 70. She testified she lost a substantial amount
8 of weight due to her migraines. AR 75–76. She testified she lies down or tries to sleep during
9 her migraines. AR 90, 1355.

10 The Ninth Circuit has “established a two-step analysis for determining the extent to
11 which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871 F.3d 664,
12 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has presented objective
13 medical evidence of an impairment that “could reasonably be expected to produce the pain or
14 other symptoms alleged.” *Garrison v. Colvin*, 759 F.3d 995, 1014–15 (9th Cir. 2014). At this
15 stage, the claimant need only show the impairment could reasonably have caused some degree of
16 the symptoms; she does not have to show the impairment could reasonably be expected to cause
17 the severity of symptoms alleged. *Id.* The ALJ found Plaintiff met this step. AR 1312.

18 If the claimant satisfies the first step, and there is no evidence of malingering, the ALJ
19 may only reject the claimant’s testimony “by offering specific, clear and convincing reasons for
20 doing so. This is not an easy requirement to meet.” *Garrison*, 759 F.3d at 1014–15.

21 The ALJ rejected Plaintiff’s testimony because she found it was inconsistent with the
22 treatment record and Plaintiff’s actual functioning. AR 1318. The ALJ erred in doing so.

23 The ALJ noted the record showed unremarkable findings on imaging, citing to a CT scan

1 of Plaintiff's head. AR 978, 1318. The ALJ cited to this same study in her last decision. *See*
2 AR 22. The Court notes, as Judge Settle did before, that the findings from that imaging study do
3 not contradict Plaintiff's testimony. *See* AR 1412. The cause of migraines is generally
4 unknown. *See Johnson v. Saul*, No. 2:18-cv-226-EFC, 2019 WL 4747701, at *4 (E.D. Cal. Sept.
5 30, 2019) (noting "the cause of migraine headaches is generally unknown"); *Groff v. Comm'r of*
6 *Soc. Sec.*, No. 7:05-CV-54, 2008 WL 4104689, at *8 (N.D.N.Y. Sept. 3, 2008) (citing *The Merck*
7 *Manual* 1376 (17th ed. 1999)).

8 The ALJ noted Plaintiff had temporary resolution of her migraines after she had surgery
9 on her thoracic spine. AR 1318. Nothing about this contradicts Plaintiff's testimony. That she
10 experienced migraine relief for what the record indicates was roughly a two-month period does
11 not undermine her testimony that she suffered migraine symptoms during the alleged disability
12 period. *See* AR 628, 634.

13 The ALJ determined Plaintiff effectively managed her symptoms with conservative
14 treatment, "which primarily consisted of prescription medications and trigger point injections."
15 AR 1318. The evidence does not support the ALJ's finding that Plaintiff's symptoms were
16 effectively controlled. Plaintiff regularly reported significant pain from her migraine headaches.
17 *See, e.g.*, AR 628, 868, 1049–50, 1287. Moreover, Plaintiff received more than conservative
18 treatment. She had multiple trigger point injections to try to control her migraines. *See, e.g.*, AR
19 617–18, 868, 1008. This was not conservative treatment. *See Garrison*, 759 F.3d at 1015 n.20
20 ("[W]e doubt that epidural steroid shots . . . qualify as 'conservative' medical treatment."). The
21 ALJ therefore erred in rejecting Plaintiff's migraine symptom testimony based on a finding that
22 her symptoms were effectively managed with conservative treatment.

23 The ALJ determined Plaintiff had intermittent symptoms and was able to function despite

1 her migraine condition. AR 1318, 1320. But nothing the ALJ cited showed Plaintiff could
2 function at a level above what she testified to. That Plaintiff was in no acute distress at some of
3 her appointments does not contradict her testimony that she suffered debilitating migraines three
4 to five times a week. And Plaintiff did not report she could function despite her migraines.
5 Rather, Plaintiff reported she had significant pain from migraines, and indicated she was
6 resigned to it. *See, e.g.*, AR 1051, 1053–54.

7 The ALJ found Plaintiff made inconsistent statements, undermining the reliability of
8 Plaintiff's statements. AR 1319. None of the ALJ's findings here support rejecting Plaintiff's
9 testimony. The ALJ first determined Plaintiff testified to using a cane, but the record indicated
10 Plaintiff consistently walked without an assistive device. *Id.* Any inconsistency here is
11 unrelated to Plaintiff's claims of severe migraine symptoms, and thus cannot support rejecting
12 her migraine testimony. Moreover, the record contains some evidence showing Plaintiff used a
13 cane. *See* AR 616, 623, 853.

14 The ALJ next determined it was inconsistent that Plaintiff reported debilitating migraine
15 pain but failed to engage in physical therapy. AR 1319. This would be a failure to seek
16 treatment rather than an inconsistent statement. Even so, the ALJ failed to address that the
17 record stated Plaintiff stopped going to physical therapy because her plan of care expired and she
18 had not noticed any improvement. *See* AR 834. The ALJ therefore erred by rejecting Plaintiff's
19 testimony based on inconsistent statements.

20 The ALJ further rejected Plaintiff's testimony because her activities of daily living were
21 inconsistent with the level of limitation alleged. AR 1320. The activities to which the ALJ cited,
22 such as Plaintiff managing her own personal care, performing some household chores, and
23 grocery shopping, do not support the ALJ's finding. *See* AR 360–61, 616, 1039. “[T]he mere

1 fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car,
2 or limited walking for exercise, does not in any way detract from her credibility as to her overall
3 disability. One does not need to be ‘utterly incapacitated’ in order to be disabled.” *Vertigan v.*
4 *Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
5 1989)). The ALJ thus erred in rejecting Plaintiff’s testimony as inconsistent with her activities of
6 daily living.

7 Finally, the ALJ rejected Plaintiff’s testimony because she determined Plaintiff stopped
8 working for reasons unrelated to her alleged disability. AR 1321. In particular, the ALJ
9 determined Plaintiff stopped working because she had been addicted to opioids, “which affected
10 every major aspect of her life, including her employment,” and focused on treatment aimed at
11 maintaining her sobriety once she stopped working. *Id.* The evidence does not support this
12 finding. The ALJ made no finding that Plaintiff’s substance abuse was material to a finding of
13 disability. And Plaintiff’s receipt of treatment to overcome her addiction in no way contradicts
14 her testimony regarding the severity of her migraine symptoms. The ALJ thus erred.

15 In sum, the ALJ failed to give any clear and convincing reasons to reject Plaintiff’s
16 testimony regarding the severity of her migraine symptoms.

17 **B. Ms. Wilmot’s Opinions**

18 Plaintiff contends the ALJ erred in rejecting the opinions of Ms. Wilmot. Dkt. 13, pp. 9–
19 10. On September 28, 2017, Ms. Wilmot signed a letter agreeing with a narrative summary from
20 Plaintiff’s counsel about Plaintiff’s symptom reports and treatment. *See* AR 606. On June 15,
21 2020, Ms. Wilmot responded to a questionnaire from Plaintiff’s counsel regarding Plaintiff’s
22 symptoms. AR 1671–72. Ms. Wilmot opined Plaintiff experienced an average of five to six
23 migraines a week. AR 1671. She agreed Plaintiff continued to report symptoms of pain,

1 photophobia, phonophobia, nausea, and vomiting after August 2017. *Id.* Ms. Wilmot reported
2 no medications or other treatments have been successful at significantly reducing the frequency
3 of Plaintiff's migraines. AR 1672. Ms. Wilmot opined Plaintiff would miss three or more days
4 of work per month due to incapacitating headache pain. *Id.*

5 An ALJ need only provide germane reasons to reject the opinions of a nurse practitioner.¹
6 *See Britton v. Colvin*, 787 F.3d 1011, 1013 (9th Cir. 2015) (holding nurse practitioners are "other
7 sources" rather than acceptable medical sources, so an ALJ need only provide germane reasons
8 to discount their opinions).

9 The ALJ rejected Ms. Wilmot's opinions because "she merely agreed with statements
10 provided by the claimant's representative in a 'check box' format instead of providing her own
11 objective statements," her opinions were inconsistent with her own treatment notes, her opinions
12 were inconsistent with the overall medical record, and her opinions were inconsistent with
13 Plaintiff's activities of daily living. AR 1324–25.

14 The ALJ did not err in rejecting Ms. Wilmot's 2017 opinions. As Judge Settle previously
15 held, the ALJ did not harmfully err in rejecting those opinions because Ms. Wilmot gave no
16 explanation for the bases of her opinions. AR 1413–14. Failure to give "any explanation of the
17 bases of [a provider's] conclusions" is a germane reason to rejection the provider's opinions.
18 *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (citing *Murray v. Heckler*, 722 F.2d 499, 501
19 (9th Cir. 1983)).

20 The ALJ erred, however, in rejecting Ms. Wilmot's 2020 opinions. Ms. Wilmot did more
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22 ¹ The Commissioner revised the regulations governing ALJ review to change nurse practitioners to
23 acceptable medical sources. *See* 20 C.F.R. § 404.1502(a)(7). Those regulations apply only to claims filed
after March 27, 2017. *See id.* Plaintiff's claim was filed on January 21, 2015, so the revised regulations
do not apply. *See* AR at 313–14, 1304.

1 in 2020 than agree with a single narrative summary of Plaintiff's symptoms and treatment, as she
2 had in 2017. Ms. Wilmot provided several written, albeit brief, explanations of her opinions.
3 *See* AR 1671–72. Moreover, Ms. Wilmot's treatment notes could explain her opinions. *See*
4 *Garrison*, 759 F.3d at 1013 (holding ALJ erred in rejecting doctor's opinions as inadequately
5 explained while ignoring doctor's treatment records). The ALJ briefly cited to Ms. Wilmot's
6 notes, but failed to adequately explain how those records contradicted or failed to support her
7 opinions regarding Plaintiff's conditions. *See* AR 1314–16, 1324–25. The ALJ noted Plaintiff
8 had certain normal objective findings during Ms. Wilmot's exams, such as intact cranial nerves
9 and ambulation with normal gait. AR 1314–16. These findings do not contradict Ms. Wilmot's
10 opinions because, as stated above, it is generally unknown what causes migraines. *Cf. Johnson*,
11 2019 WL 4747701, at *4. Plaintiff did report to Ms. Wilmot symptoms of headaches, dizziness,
12 and blurry vision. AR 994–95, 1000, 1009, 1247. The ALJ therefore failed to adequately
13 explain how Ms. Wilmot's treatment records contradicted or failed to support her 2020 opinions.

14 The ALJ's last two reasons for rejecting Ms. Wilmot's 2020 opinions—inconsistency
15 with the overall medical record and Plaintiff's activities of daily living—mirror the reasoning
16 provided to reject Plaintiff's testimony. *See* AR 1318–20, 1324–25. These reasons fail here for
17 the same reasons they failed with respect to Plaintiff's testimony.

18 The ALJ therefore failed to give any germane reasons for rejecting Ms. Wilmot's 2020
19 opinions. The ALJ did not err in rejecting Ms. Wilmot's 2017 opinions.

20 C. Scope of Remand

21 Plaintiff asks the Court to remand this matter for an award of benefits. Dkt. 13, p. 10.
22 Remand for an award of benefits “is a rare and prophylactic exception to the well-established
23 ordinary remand rule.” *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir. 2017). The Ninth

1 Circuit has established a three-step framework for deciding whether a case may be remanded for
2 an award of benefits. *Id.* at 1045. First, the Court must determine whether the ALJ has failed to
3 provide legally sufficient reasons for rejecting evidence. *Id.* (citing *Garrison*, 759 F.3d at 1020).
4 Second, the Court must determine “whether the record has been fully developed, whether there
5 are outstanding issues that must be resolved before a determination of disability can be made,
6 and whether further administrative proceedings would be useful.” *Treichler v. Comm’r of Soc.*
7 *Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation marks
8 omitted). If the first two steps are satisfied, the Court must determine whether, “if the
9 improperly discredited evidence were credited as true, the ALJ would be required to find the
10 claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. “Even if [the Court] reach[es] the
11 third step and credits [the improperly rejected evidence] as true, it is within the court’s discretion
12 either to make a direct award of benefits or to remand for further proceedings.” *Leon*, 880 F.3d
13 at 1045 (citing *Treichler*, 773 F.3d at 1101).

14 Plaintiff has satisfied each step of this framework. At the first step, the ALJ did not
15 provide legally sufficient reasons to reject Plaintiff’s testimony and Ms. Wilmot’s 2020 opinions.
16 At the second step, there are no true conflicts in the record that the ALJ has not already had two
17 opportunities to address. No doctor or medical provider directly contradicted Plaintiff’s
18 testimony or Ms. Wilmot’s 2020 opinions regarding the frequency of Plaintiff’s migraine
19 symptoms and resulting absence from work. Contrary to Defendant’s assertion, neither the
20 testifying medical expert, John Kwok, M.D., nor the state agency medical consultants addressed
21 Plaintiff’s migraine symptoms. *See* AR 111–16. There are no factual issues the ALJ must
22 resolve, particularly since she had an opportunity to address any such issues after the first
23 remand in this case, and thus further proceedings would not be useful. *See Treichler*, 775 F.3d at

1 1103–04.

2 Turning to the third step, the ALJ would be required to find Plaintiff disabled if
3 Plaintiff’s testimony and Ms. Wilmot’s 2020 opinions were credited as true. In particular,
4 Plaintiff testified she has migraines three to five times a week, lasting from two to 12 hours, and
5 needs to lie down or sleep during that time. AR 73–74, 90, 120, 1353–55. Ms. Wilmot opined
6 Plaintiff would be absent from work three or more times per month due to her migraines. AR
7 1672. The vocational expert testified employers would tolerate a maximum of one absence per
8 month. AR 1363. Based on this testimony, and crediting as true Plaintiff’s testimony and Ms.
9 Wilmot’s 2020 opinions, the ALJ would be required to find Plaintiff disabled.

10 **CONCLUSION**

11 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
12 case is **REMANDED** for an award of benefits.

13 DATED this 2nd day of December, 2021.

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16 The Honorable Richard A. Jones
17 United States District Judge
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